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In The

Supreme Court of the United States

ROBIN K. NOLAN,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the *non*-preemption clause of the ADA, 42 U.S.C. § 12201(b), imposes on state disability discrimination law the requirement to engage in an interactive process to accommodate a worker's disability and, if so, whether that process was satisfied by Boeing's conduct in this case.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no other parties to the proceedings other than those listed in the caption. However, two other similar actions against Respondent The Boeing Company ("Boeing"), brought by Arlene H. Lumper and Dennis L. Langan, were consolidated on appeal with the action brought by Petitioner Robin K. Nolan, and the decision of the Washington Court of Appeals that Nolan seeks the Court to review addresses and disposes of all three actions. Lumper and Langan did not join in the Petition filed by Nolan. Boeing has no parent corporations, and no publicly held company owns 10% or more of its stock, except that State Street Bank is owner of record for certain shares it holds in trust as part of Boeing's employee benefits plans.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

Boeing agrees with Nolan's description of the opinions below.

II. JURISDICTION

Boeing does not agree with Nolan that the Court has jurisdiction under 28 U.S.C. § 1257(a). Section 1257(a) provides that the Court may review final judgments of the highest court of a state where the validity of a federal law or treaty is drawn into question, where the validity of a state law is questioned on the grounds that it is repugnant to the federal Constitution, treaties or laws, or where a right created by federal law is asserted.

As explained more fully below, the claims Nolan has pursued in this action arise exclusively out of state law. Moreover, there is no colorable argument that the state law at issue is contrary to the federal Constitution or laws.

III. PERTINENT STATUTES AND RULES

Nolan's claims in this action are based on the Washington Law Against Discrimination, Chapter 49.60 of the Revised Code of Washington ("RCW"). RCW 49.60.180 provides: "It is an unfair practice for any employer . . . (2) To discharge or bar any person

from employment because of . . . physical disability. . . ."

IV. STATEMENT OF THE CASE

A. Factual Background

Nolan's Statement of the Case contains many inaccuracies and allegations unsupported by the record. Below is a summary of the undisputed facts, which addresses the material misstatements of fact in the Petition.

1. Nolan's Employment at Boeing

Nolan was hired by Boeing in 1991 as a manufacturing employee at its facility in Spokane, Washington, which made parts for aircraft. Nolan was hired as plastic bench mechanic, grade 3. Nolan continued working in this job classification until 1995-96, when the Spokane facility underwent a fundamental restructuring, changing from a traditional manufacturing model to a "cellular" manufacturing model. Washington Court of Appeals Clerk's Papers ("CP") 194-95. Under this new manufacturing scheme, workers were assigned to a cell, and each cell generally completed all of the tasks that were involved in producing a particular aircraft part, from start to finish. In connection with the change to cellular manufacturing, all production workers, including Nolan, were upgraded to the position of non-metallic sub-assembly technician, grade 4. CP 194-95,

App. 2a-3a. Nolan remained in this job classification until she was medically laid off.

2. Nolan's Medical Restrictions

On June 17, 1999, while working at Boeing's Spokane facility in her assigned job, Cell H, Nolan reported that she "felt a pop" in her rib cage. As a result of the injury, Nolan visited the emergency room at a local hospital, where her condition was initially diagnosed as "costo condritis." Nolan's physicians later determined that she had fractured a rib. CP 93-94, 149-50.

The day after her injury, Nolan returned to her Cell H job in a limited capacity, with a two-week set of restrictions on tasks that she was allowed to perform. In order to accommodate these restrictions, Boeing temporarily assigned Nolan to work as a "strider/monitor" in Cell H. On June 25, 1999, Boeing re-assigned Nolan to a light-duty position in the Spokane facility's maintenance department. CP 94, 134-40.

Meanwhile, Nolan sought additional treatment from Dr. Terrence Rempel, her treating physician. Dr. Rempel issued a series of temporary medical restrictions for Nolan in the following months based on her condition arising from her June 17 injury. As a result of those restrictions, Nolan was unable to return to her regular position in Cell H, and instead was assigned to a series of light-duty assignments for approximately the next four months. CP 94-97.

On October 26, 1999, approximately four months after her June 17 injury, Nolan's manager asked Nolan whether she could return to her regular position in Cell H to work in a limited capacity, cutting insulation. Nolan agreed. However, upon starting the assignment, Nolan determined that she could not perform even this limited function of her job, and complained to Boeing's Health Services Administrator, Pamela Jo Brown. App. 4a. On October 27, 1999, Boeing received a new, stricter set of medical restrictions from Dr. Rempel. As a result of those new restrictions, Nolan was returned to working light-duty in the maintenance department. CP 95-96.

3. Boeing's Efforts to Identify Reasonable Accommodations

On November 30, 1999, Boeing received new medical restrictions for Nolan from her primary treating physician, Dr. Rempel. For a period of several months following Nolan's June 1999 injury, Dr. Rempel had repeatedly provided Boeing with a succession of temporary medical restrictions for her. However, the medical restrictions issued on November 30 for Nolan by Dr. Rempel were *permanent*. Boeing immediately issued a medical recommendation for Nolan based on Dr. Rempel's new, permanent restrictions. That medical recommendation was highly limiting, stating that "Nolan may frequently lift/carry 10 lbs. and occasionally up to 25 lbs.; she cannot lift/carry over 25 lbs.; she may occasionally bend/twist; she could not work above shoulder level;

she could not work with high/low impact vibratory tools." CP 94-97, 163-64.

On December 1, 1999, Boeing's Medical Placement Review Board ("MPRB") convened in order to determine whether Boeing could reasonably accommodate Nolan in her job, given her new set of permanent medical restrictions. The MPRB is comprised of a cross-section of Boeing employees, including HR, management, and Boeing medical representatives, Equal Employment Opportunity and return-to-work specialists, and the Spokane facility's operations manager. The MPRB, in accordance with its process for evaluating whether an employee can be reasonably accommodated in his or her position, compared Nolan's medical restrictions with the job analysis for her position. The job analysis, which was prepared by a third party, described the physical requirements to perform the essential functions in the Spokane facility's various cells. If the MPRB determined that the employee could *not* perform the essential functions of his or her position with or without reasonable accommodations, its next step was to conduct a search for any other available positions in which the employee could be accommodated. CP 97-98, 245-46, 278-80.

In its December 1 meeting, the MPRB considered whether Nolan could return to her Cell H position, given her new permanent medical restrictions. Following the meeting, Brown contacted Nolan, who suggested that she might be able to work in another work group, Cell A. Based on Nolan's suggestion that

a Cell A accommodation might be an appropriate accommodation for her, Brown sent job analyses for Cell A as well as Nolan's home cell, Cell H, to Dr. Rempel so that he could assess whether having Nolan work in one of those cells would be consistent with her medical restrictions. CP 97-98, 248.

The next day, Dr. Rempel responded to Boeing's inquiry. Dr. Rempel wrote:

> Pam, I reviewed the Cell A and H JAs [job analyses]. Although Robin [Nolan] could perform the activities for Cell A, she could exacerbate her condition. It would only be a matter of time before she would have recurrent problems.

CP 333-34. Rempel also indicated that Nolan's position in Cell H was not consistent with her medical restrictions. *Id.* As Nolan acknowledges, a specialist she had consulted, Dr. Osebold, also placed permanent work restrictions on her at about this time and opined that she could not work in Cell H unless and until her medical condition improved at some unknown point in the future. Petition at 5.

On December 3, 1999, Brown, Judy Clemons (Boeing's workers' compensation administrator) and Nolan's second-level manager met with Nolan to gather information for a second upcoming MPRB meeting. At the meeting, Nolan agreed that she could not perform her Cell H position. Nolan also asked to have her treating physician, Dr. Rempel, visit the Spokane facility so that he could assess whether she

could work in Cell A or H. Brown explained to Nolan that this was an unusual request, but stated that she would ask Dr. Rempel if he could visit the facility. Accordingly, Brown contacted Dr. Rempel. Dr. Rempel indicated that he could visit the facility on January 6, 2000. Nolan was also placed on a medical leave of absence at the end of the meeting, and was informed that another MPRB meeting would be held to review her situation. CP 98-99, 172, 174-76.

The MPRB met again on December 14, 1999, to revisit whether Nolan could be accommodated in her Cell H position or, if not, whether she could be reasonably accommodated in another available position. The MPRB determined that Nolan's multiple, permanent medical restrictions simply could not be reconciled with the wide variety of physically demanding tasks in the Cell H job, which included lifting or carrying up to 25 lbs., frequent bending and twisting, use of high and low impact vibratory tools, and frequent reaching. The MPRB noted that the lifting/carrying requirement might be reasonably accommodated, but that the other requirements clearly could not. The MPRB also considered whether other available, vacant positions existed in which Nolan might be reasonably accommodated, and circulated Team Route Slips to managers throughout the plant to assess whether there were appropriate, available openings for Nolan. However, this survey revealed that there were *no* openings in any area of the plant. CP 99, 178, 198-99, 203, 352, 362. (There is utterly no support in the record, and it defies common

sense, that in a plant of well *under* 1000 total employees, there were 290 open (high-paying, union) positions during this time period, as Nolan claims in her Petition.)

The MPRB was charged with considering – and did consider – whether Nolan's disability could be accommodated. At no time was Nolan, her doctors, or Boeing able to identify any accommodation that would have made it medically possible for Nolan to perform her job in Cell H. (Even during the years of litigation that have ensued, no such accommodation has ever been identified by Nolan and her legal team. Nolan's current argument, that she should have been allowed an even longer medical leave of absence to allow time for her injuries to heal, is contrary to her own doctor's judgment that her medical restrictions were permanent.) At no time did Boeing ever tell Nolan that it "did not want to accommodate her disability," or refuse to consider accommodations, as Nolan now argues.

On January 6, 2000, Dr. Rempel personally visited the Spokane facility. Based on his observations of the work performed at the Spokane facility, Dr. Rempel noted that in Nolan's Cell H job, "there is a significant amount of grasping, pushing, and pulling, including with force" required. He also observed that Cell A involved a "significant amount of reaching and grasping," and said nothing to contradict his earlier determination that Nolan, in light of her permanent medical restrictions, was simply not able

to perform the essential functions of her position. CP 180.

4. Nolan's Medical Layoff and Subsequent Events

As Nolan herself acknowledges, the MPRB met on multiple occasions on Nolan's case. Boeing had numerous interactions with Nolan and her doctor. However, in the final analysis, Nolan's treating physician determined that she was not medically able to perform her existing job, no accommodation could be identified, and no open positions were available. Thus, Nolan was issued a medical layoff on January 11, 2000.[1] CP 182.

Nolan received workers' compensation benefits for nearly a year-long period leading up to, and following, her medical layoff. Nolan received temporary total disability benefits from December 1999 through November 2000, nearly a year after her medical layoff. Nolan received these benefits in

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[1] Nolan's argument (Petition at 8) that a 1998 email allegedly shows that Boeing had a scheme to reduce the number of injured workers must be addressed. First, the email at issue has never been authenticated by testimony or affidavit. It was simply stapled to one of Nolan's briefs. CP 712-13. Second, there is no evidence that the email or its supposed author had any connection to Nolan's medical layoff. CP 805. Third, even if authentic, the email never uses the word "baggage" and seems to be an innocuous exhortation to reduce on-the-job injuries.

addition to other medical and rehabilitative benefits. CP 281-328.

Nolan also underwent a Physical Capacities Evaluation ("PCE") on March 20, 2000, approximately three months after her medical layoff, in order to assess her employability. That PCE confirmed yet again that Nolan probably would never be able to regain the physical abilities to return to her position at Boeing, due to her continued symptoms and inability to reach forward and upward with her right upper extremity. CP 336-46.

B. Procedural Background

Nolan, Lumper, and Langan filed actions against Boeing in Spokane County (Washington) Superior Court, alleging disability discrimination under the Washington Law Against Discrimination, Chapter 49.60 RCW ("WLAD"). Boeing removed the cases to the United States District Court for the Eastern District of Washington, and then moved for summary judgment dismissal, on the basis that the claims were preempted by Section 301 of the National Labor Relations Act. The trial court ruled that the claims were preempted, but the Ninth Circuit Court of Appeals reversed. The Ninth Circuit concluded that the scope of Section 301 preemption was narrower than the trial court had determined, and ordered that the three actions be remanded to state court. *Lumper v. Boeing Corp.*, 2003 WL 22301793, at **1-2 (9th Cir. Oct. 7, 2003).

After the cases were remanded to Spokane County Superior Court, Boeing moved for summary judgment dismissal of Nolan's disability discrimination claims as a matter of law. The trial court granted Boeing's motion for summary judgment, dismissing Nolan's claims in their entirety and with prejudice. (Separately, Boeing moved for summary judgment dismissal of Lumper's and Langan's actions, and the motions were granted.)

Nolan, Lumper, and Langan then appealed their cases to the Washington Court of Appeals, Division III, where the appeals were consolidated. The court of appeals affirmed, ruling that the trial court had correctly decided that each of the claims in the three actions failed as a matter of law. Nolan, Lumper, and Langan then sought discretionary review by the Washington Supreme Court. On February 5, 2008, the Washington Supreme Court denied their petitions for review. App. 27a-28a.

V. REASONS FOR DENYING THE PETITION

A. Summary of Reasons

Nolan desperately tries to create a federal law issue in this case but it cannot be done. This is a routine employment discrimination action brought exclusively under state anti-discrimination law, like countless others brought every day in state courts across the country. Nolan seeks review by the Court based on a supposed split between the unreported intermediate *state* appellate court decision in her case

and a decision of the Ninth Circuit that was *vacated* by the Court. Assuming, arguendo, that such a split exists (and one does not), it plainly cannot be the basis for the Court to grant review. The decisions below were correct, fact-specific, and unpublished. No issue of federal law is presented and notably, the Petition violates this Court's Rule 14(g)(i) in that it seeks review of a state court judgment, but fails to identify "when the federal question[ ] sought to be reviewed w[as] raised; the method or manner of raising [it] and the way in which [it was] passed on by those courts." This case is unworthy of review by the Court.

B. No Issue of Federal Law Is Presented in This State Law Case

Nolan had a choice when she commenced this action: she could have pleaded a cause of action under the ADA, a cause of action under the Washington Law Against Discrimination or both. For whatever strategic or tactical reasons (e.g., avoiding federal court), Nolan chose to plead her cause of action under the WLAD and to plead no ADA or other federal law claim. Nolan has never pleaded a cause of action based on federal law.

Boeing initially removed the case to federal district court, arguing that Nolan's state law claim for disability discrimination was preempted by Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, because the disability discrimination claim

could not be resolved without the court interpreting certain provisions of the union contract that governed the terms and conditions of Nolan's employment relationship with Boeing. The federal district court agreed with Boeing's argument and dismissed Nolan's action as preempted. The Ninth Circuit reversed and remanded to state court, based in part on an intervening decision of that court clarifying (and limiting) the scope of Section 301 preemption of a statutory claim. Throughout those proceedings in federal court, Nolan disclaimed any federal law cause of action and consistently argued against any federal jurisdiction.

Upon remand to Spokane County Superior Court, the claims in this action have been decided on entirely state law grounds. It is thus stunning that Nolan is now arguing that her disability discrimination claim is (or should be) based on federal law, or that this action presents a substantial question of federal law. In any event, her arguments do not withstand scrutiny, as explained below.

C. 42 U.S.C. § 12201(b) Does Not Preempt State Laws or Require that the ADA Be Incorporated into State Law

Nolan's main argument that a federal law issue is presented here is that 42 U.S.C. § 12201(b), a section of the ADA, requires that when, as here, a state court is applying a state anti-discrimination law, the state court must incorporate provisions of the ADA into the state law, whenever the ADA provides

more protection to the plaintiff than state law. This argument is refuted by the plain language of the ADA and the dearth of any case law supporting Nolan's reading.

Section 12201(b) provides:

> Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter.

42 U.S.C. § 12201(b). The statute, then, is a *non*-preemption provision. The statute provides that the ADA does *not* preempt state laws that provide greater or equal protections to the rights of disabled than the ADA. It evinces a congressional intent to *not* completely occupy the field of discrimination against the disabled.

Nolan turns Section 12201(b) on its head by arguing it is a preemption provision. Nolan argues that Section 12201(b) means that if a provision of state law provides less protection than the ADA, then the state law is preempted by – and replaced with – the ADA provision. However, there is plainly no such language in the statute.

Not surprisingly, there is no case authority to support this extremely strained reading of Section 12201(b). Nolan cites one trial court case, *American Association of People with Disabilities v. Hood*, 278 F. Supp. 2d 1345 (M.D. Fla. 2003), for the proposition

that state law "must give way to the ADA," Petition at 11, but the case is inapposite and does not stand for that proposition. *Hood* is a case filed in federal court and brought under the ADA, *not* state law. The *Hood* plaintiffs alleged that individuals with disabilities did not have adequate access to voting machines. 278 F. Supp. 2d at 1350-51. One defense raised by the defendants was that they had complied with other federal and state laws specifying certain aspects of voting machine access. *Id.* at 1355-56. The district court rejected that defense. *Id.* at 1356. The district court in *Hood* mentions that Section 12201(b) of the ADA provides that the ADA shall not be construed to invalidate any federal or state law offering greater protection to the rights of individuals with disabilities than under the ADA, *id.*, but that is far from ruling that state or local laws offering lesser protection are preempted by the ADA. In any event, *Hood* did not involve a claim under a state anti-discrimination law, so it cannot stand for the proposition suggested in the Petition that when a plaintiff brings a claim under state anti-discrimination laws, certain provisions of the ADA must be imported into that claim.

D. Boeing Engaged in an Interactive Process with Nolan

Even if Nolan had pursued a federal ADA claim and even if the ADA preempted the Washington Law Against Disabilities, there is no reason for the Court to grant review because Boeing engaged in the very interactive process that Nolan argues is required by

the ADA and only "recommended" under the WLAD. Based mainly on the vacated decision in *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105 (9th Cir. 2000), *vacated*, 535 U.S. 391 (2002), Nolan argues that the ADA requires that an employer engage in the interactive process with any employee whose disability prevents her from doing her job, no matter what the surrounding facts are. Nolan argues that this interactive process is not required under the Washington Law Against Discrimination and is hence an instance where the WLAD offers less protection than the ADA. Thus, Nolan argues, the state court applying the WLAD here should have incorporated the ADA's allegedly categorical requirement for engaging in the interactive process.

Setting aside the legal infirmities discussed above, Nolan's facts make this case unworthy of the Court's review as to whether the interactive process is required under both the ADA and the WLAD. In this case, it is indisputable that Boeing repeatedly conferred with Nolan and her treating physician in the weeks and months leading up to her medical layoff. Boeing undeniably engaged in an interactive process with Nolan, as explained in the court of appeals' decision. App. 4a, 5a, 14a.

Even if Section 12201(b) could be converted from a non-preemption provision to a preemption provision, requiring the state court to adopt any ADA requirements for the interactive process, it would not have changed the result here. In sum, Nolan cannot

prevail even under the legal proposition she has asserted.

E. No Clear Circuit Split Exists Concerning the Interactive Process Under the ADA

Perhaps recognizing that a supposed conflict between an unreported intermediate state court of appeals decision and a Ninth Circuit decision is not certworthy, Nolan uses much of the Petition to argue that the vacated decision of the Ninth Circuit in *Barnett* is in conflict with decisions of other circuits. Nolan argues that the Court "should grant review to resolve the split in the Circuits as to the necessity of a mandatory interactive process between an employer and disabled worker." Petition at 21. Even if this state court case were the proper vehicle to resolve such a federal circuit split (which it is not), the Tenth and Eleventh Circuit cases cited by Nolan do not present a square conflict with the Ninth Circuit's decision in *Barnett*.

In *Willis v. Conopco, Inc.*, 108 F.3d 282, 285 (11th Cir. 1997) (per curiam), the Eleventh Circuit "assum[ed]" that "an employer has an affirmative obligation . . . to engage in the interactive process." It did not reject *Barnett*'s decision that this process was required, but ruled that *if no reasonable accommodation was available*, an employer could not be held liable merely for not engaging in the interactive process. The Ninth Circuit recognized this same principle in *Barnett*: "We hold that employers, who

fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." 228 F.3d at 1116. In *White v. York International Corp.*, 45 F.3d 357, 363 (10th Cir. 1994), the Tenth Circuit affirmed a summary judgment for the employer on the unremarkable basis that the plaintiff "produced no evidence that accommodation was possible." The Tenth Circuit also observed in passing that the EEOC regulations regarding the interactive process are merely a "*recommendation* [not] a statutory *requirement*," *id.*, but the alleged conflict between dictum in this 13-year-old case in which the losing party did not seek review from the Court and a decision vacated by the Court six years ago does not present the Court with any square conflict warranting this Court's attention at this time.

F. The Decision of the Washington Court of Appeals Is Correct on the Undisputed Facts of This Case

Finally, the Petition should be denied because the state court of appeals correctly decided the questions of Washington state law presented to it. The court held that summary judgment in favor of Boeing was proper because Nolan simply failed to come forward with evidence of essential elements of her claims.

Nolan's central legal claim was that Boeing failed to reasonably accommodate her disabilities. As the Court of Appeals correctly stated, under Washington

law, in a failure to accommodate claim, the plaintiff bears the initial burden of stating a prima facie case. App. 8a. In order to state a prima facie case, the plaintiff must show that (1) he or she had a sensory, mental or physical abnormality that substantially limited his or her ability to perform the job; (2) he or she was, nonetheless, qualified to do the essential functions of the job; (3) he or she gave the employer notice of the abnormality; and (4) the employer failed to affirmatively adopt available measures to accommodate the abnormality. *Id.* (citing *Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 138-39, 64 P.3d 691 (2003)).

As the trial court and appellate court recognized, Nolan's failure to accommodate claim failed as a matter of law because she could not show that she could perform the essential functions of her manufacturing job, with or without reasonable accommodations. As the appellate court explained, Nolan's "physician said she could not do any of the work without risk of serious injury" and that she "could perform none of the production tasks, by [her] own evidence." App. 14a. The undisputed evidence also showed that neither Nolan nor Boeing was "able to suggest any way to modify the job to enable [her] to continue in these production cells." *Id.* As an alternative to showing she could do the essential functions, Nolan could have tried to show she was qualified to fill a vacant position, but as the appellate court concluded, Nolan "did not produce specific evidence of any particular vacant positions, claim that [she]

applied for them, or claim [she was] denied an available position because of [her] disability." App. 15a. Nolan is simply unhappy with the state appellate court's reading of the summary judgment record.

In summary, the Washington Court of Appeals' unpublished opinion affirming dismissal of the Nolan's claims amounts to nothing more than a standard and unremarkable application of the law in Washington on reasonable accommodation claims to the particular undisputed facts of her case. There is no error in the Court of Appeals' decision and certainly not one worthy of the Court's review.

VI. CONCLUSION

Nolan's petition for writ of certiorari should be denied.

Respectfully submitted,

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